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GUIDELINE FOR THE DESIGNATION OF CONTAMINATED SITES UNDER THE ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT



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**Environmental Service
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PROCESS FOR DESIGNATION AND REMEDIATION	1
1. Determination of Contaminated Sites	2
1.1 Core Criterion	2
1.2 Supplemental Criteria	2
2. Identification of Potentially Responsible Persons	3
3. Review of Information and Determination of Responsible Persons.....	4
3.1 Limitations on Liability	5
3.1.1 Environmental Testing and Investigations	5
3.1.2 Receivers, Receiver-Managers and Trustees in Bankruptcy.....	5
3.1.3 Fiduciary Representatives	6
3.1.4 Municipalities	7
3.1.5 Manufacturers and Suppliers of Substances	7
3.1.6 Lenders	7
3.1.6.1 Lenders as Owners	7
3.1.6.2 Lenders – Actual Influence or Involvement	7
4. Designation of Contaminated Site	8
4.1 Designation Document	9
4.2 Notice of Designation	9
4.2.1 Property Owners and Responsible Persons	9
4.2.2 Municipal Authorities	9
4.2.3 Regional Health Authorities	9
4.2.4 General Public	9
4.3 Statements of Concern	10
4.4 Appeals of Designation	10
5. Cost Allocation and Remediation	12
5.1 Factors for Consideration	12
5.1.1 Allocation Factors	12
5.1.2 Remediation Factors	13
5.2 Negotiations Between Responsible Persons	13
5.2.1 Timelines For Negotiations	14
5.2.2 Voluntary Cost Allocation and Remediation Agreement	14
5.2.3 Review and Approval of Agreement	15
5.3 Directed Cost Allocation and Remediation Plan	16
5.3.1 Allocation by Director	16
5.3.2 External Advisory Committee	16
5.3.3 Timelines	17

5.4 Joint and Several Liability	17
6. Environmental Protection Orders (s.114 EPEA).....	18
6.1 Contents and Format	18
6.1.1 Allocation.....	18
6.1.2 Remediation.....	18
6.2 Notice of Order	19
6.3 Appeals of Order	19
7. Non-Compliance or Failure to Remediate.....	19
7.1 Remedial Action	19
7.2 Enforcement Action.....	20
7.2.1 Enforcement Orders	20
7.2.2 Prosecution Under EPEA.....	20
7.2.3 Government Remediation and Cost Recovery	20
8. Completion of Remediation.....	21
8.1 Verification of Remediation	21
8.2 Registration of Land or Product Use Restriction	21
8.3 Letter of Compliance	22
8.4 Remediation Certificate.....	22
8.5 Reclamation Certificate.....	23
FIGURE 1 - Contaminated Sites Designation Process	24
GLOSSARY	25
APPENDIX I.....	27
APPENDIX II.....	35

PROCESS FOR DESIGNATION AND REMEDIATION

The principal Alberta legislation defining or affecting contaminated sites issues and actions is the Environmental Protection and Enhancement Act ("EPEA" or "the Act") which lays out the powers, roles and responsibilities of Albertans and their government in the assessment and management of environmental contamination. Various provisions in EPEA provide Alberta Environment with powers to deal with site contamination. These powers include environmental protection orders for substance release and reclamation and the designation of contaminated sites. Each of these has certain restrictions imposed by EPEA, which may limit the tools' use or application in some circumstances.

Part 4, Division 2 of EPEA provides for the designation of contaminated sites by the Director and for the subsequent remediation of those sites by responsible persons. Each of the six Environmental Services Regional Directors ("the Director") of Alberta Environment is responsible for designation of a contaminated site in their region. This guideline is intended to aid in implementing the contaminated sites provisions and to assist parties involved with contaminated sites in becoming aware of the designation process. This process is outlined in Figure 1. Normally, the designation of a contaminated site will only occur as a last resort when there are no other appropriate tools.

Sites can be designated by Alberta Environment, on its own initiative, or a proponent may request the use of the contaminated sites provisions of EPEA. To support a request for designation, a proponent must:

- a) conduct and document a site investigation, acceptable to the Director, to determine the existence, nature and extent of any contamination; or
- b) produce a copy of a document, acceptable to the Director, which reports the results of a previous site investigation into the contamination of an area of the environment that includes all or part of the site.

As a minimum, a site investigation report must contain:

- description of site location;
- description of historical activities on the site;
- onsite and surrounding land use information;
- topographical information;
- description of shallow geologic materials;
- depth to water table and direction of groundwater flow;
- information on the nature and extent of any contaminants in soil and groundwater;
- surface cover information;
- proximity to surface water; and
- proximity to drinking water supply.

1. Determination of Contaminated Sites

The first step in the site designation process is to determine whether a site is eligible to be designated a contaminated site by the Director. A number of criteria must be considered in determining whether a site merits designation. These have been divided into two categories, core and supplemental criteria.

1.1 Core Criterion

Section 110(1) of the Act requires that the Director must be of the opinion that the presence of a substance on a site may cause, is causing or has caused a significant adverse effect in order to designate the site as a contaminated site.

Section 1(b) of EPEA defines “adverse effect” as “impairment of or damage to the environment, human health or safety or property”. Adverse effect can become significant when there is an actual or high probability of impact which has or could have a severe consequence on human health, safety or the environment.

1.2 Supplemental Criteria

The following supplemental criteria are factors that may be relevant and may assist the Director in determining whether a site should be designated as a contaminated site.

- **There are liability allocation issues related to the property affected by contamination.** This criterion includes the following factors:
 - a) **There may be a large number of responsible persons.** It will be necessary to allocate remediation costs among responsible persons if they cannot reach a voluntary agreement. This will be more complicated if a large number of responsible persons are involved with the site. A key feature of Part 4, Division 2 of the Act is that its provisions explicitly provide for the allocation of liability for remediation costs among responsible persons, to enable a fair distribution of responsibility for contamination.
 - b) **There may be orphan shares of liability.** If there is or is likely to be an orphan share or shares, this will be relevant in the initial stages of the designation process. A responsible person may be unable to remediate the site due to a lack of funds or assets, there may be no easily identifiable responsible person, or the identity of the person or persons who may have contaminated the site may be unclear. This raises the possibility of orphan shares or an orphan site.
 - c) **The provincial government may be a responsible person.** If the provincial government is a responsible person with respect to the site, then a fair and impartial allocation process (particularly in the eyes of other responsible persons and taxpayers) is needed to deal with the site and the government liability for remediation costs.

- **There is a need to restrict land use or product use.** The contaminated sites provisions may be used if there is a need to restrict use of the contaminated site or use of products coming from the contaminated site and no other tools are available to do so. Section 117 of the Act enables regulations to be made regulating or prohibiting the use of a designated contaminated site or the use of any product that comes from a designated contaminated site. Designation may also be useful where the site under consideration is located near a sensitive area or areas of the environment. Designation of the site will enable the imposition of lasting land use restrictions on the site (see section 8.2), where required to protect sensitive areas, and will also allow for greater public information and participation.

2. Identification of Potentially Responsible Persons

Persons who may fall within the scope of potentially responsible persons, as set out in section 96(1)(c) of the Act, include:

- Persons whom the Director considers caused or contributed to the presence of the substance on the site. The Director may use this category to attribute liability to parent corporations in appropriate circumstances, to prevent situations where responsible persons might otherwise escape liability for remediation. As well, this category may be used to assess liability against lenders who have or had actual influence or involvement in the control or management of the business of a responsible person, where the lender's actions caused or contributed to the contamination of the site.
- The owner of the site, which under the Act also includes occupiers such as tenants.
- Persons who previously owned the site at any time when the substance was on the site. This category includes previous occupiers and tenants.
- Persons who have taken over from the persons mentioned above, such as subsequent purchasers or owners of property or businesses, executors or administrators of estates, fiduciary trustees, and receivers, receiver-managers and bankruptcy trustees in cases of insolvency.*
- Persons who acted as agents of any of the persons mentioned above or who were principals of these persons.*

Once potentially responsible persons have been identified, the Department will contact each of these parties by letter regarding their potential involvement in remediation of the site. This letter will request that these persons contact the Department to express their concerns about being named a potentially responsible person, and also if they feel that there are additional potentially responsible persons who have not been identified by Alberta Environment. Information regarding the identity of such "new" potentially responsible persons and their involvement with the site will aid the Department in ensuring that all persons who may have had any responsibility in causing or

* See Section 3.1 for further details

contributing to the contamination are included in the designation process. A specific time line (usually 30 days) is associated with these letters.

3. Review of Information and Determination of Responsible Persons

After the 30 day time period, the Director will review all information received from potentially responsible persons, together with information the Department already holds about the site, in assessing the next steps to be taken in the designation process. If potentially responsible persons agree about the extent of remediation and allocation of liability and the Director approves the agreement, it may not be necessary to formally designate the site as a contaminated site. If there is no indication that remediation will occur, or no agreement is in place, then the Director may choose to formally designate the contaminated site under Part 4, Division 2 of the Act.

Upon receipt and review of the information, the Director will be able to determine who will be responsible persons with respect to the contaminated site. These parties are subject to the duties and liabilities set out in the Act. They are also entitled to specific notice of certain steps in the designation process, and have rights to appeal certain decisions made by the Director to the Environmental Appeal Board. These matters will be dealt with in sections 4.2 through 4.4, 6.2 and 6.3. Determination of the responsible persons will occur prior to designation of a contaminated site.

MORE ABOUT RESPONSIBLE PERSONS:

When a person is identified by the Department as a responsible person, this identification has both immediate and long-term implications.

Responsible persons are given direct notice of the designation of the contaminated site, and have the right under the Act to appeal that designation to the Environmental Appeal Board. These persons will also be involved in any negotiations undertaken to seek voluntary settlement of remediation of the contaminated site (including allocation of remediation and associated costs). However, simply being identified as a responsible person does not automatically attribute liability for remediation to a responsible person.

Should no voluntary agreement be reached, the Director will issue an Environmental Protection Order under section 114 of the Act to the responsible persons requiring remediation action to be taken and allocating liability for costs. If such an Environmental Protection Order is issued, responsible persons will receive a copy of the order, and have the right under the Act to appeal the order to the Environmental Appeal Board.

The Department reserves the right to identify additional potentially responsible persons or responsible persons at any stage of the designation process, as information merits. Where additional potentially responsible persons or responsible persons are identified, the Department will take steps to notify existing responsible persons who have already been identified through the

designation process, and relevant time periods will begin anew to allow for equitable treatment of the newly identified potentially responsible persons or responsible persons.

3.1 Limitations on Liability

The following sections discuss a variety of situations in which the liability of parties for contaminated site remediation may be limited. All such parties, however, are affected by general reporting obligations imposed on them by environmental law. Section 99 of EPEA imposes obligations on persons who have control of released substances, persons who cause releases, and police officers and public authorities (including local authorities) with knowledge of releases to report these substance releases. In particular, trustees in bankruptcy, receivers and receiver-managers are required by federal law to comply with any duty that is imposed by provincial laws to report or make disclosures. Release reporting requirements are contained in the *Release Reporting Regulation*.

3.1.1 Environmental Testing and Investigations

Where a third party conducts tests or investigations to determine the environmental condition of land, they will not bear personal liability for contamination existing prior to these tests or investigations having been conducted. However, section 96(1)(c)(viii) of the Act provides that such parties may be liable if these tests or investigations cause new environmental problems or aggravate existing environmental problems on the site.

3.1.2 Receivers, Receiver-Managers and Trustees in Bankruptcy

Receivers, receiver-managers, and trustees in bankruptcy who control the property of a responsible person will be exempt from personal liability for contamination that was present prior to their taking control of the property unless they contribute to further accumulation or release of substances. The estate (of the responsible person) that they control may still be liable for remediation costs. Section 226 of EPEA sets out a limitation of liability for these receivers, to the value of the property.

The Department takes a position consistent with the newly enacted amendments to the federal *Bankruptcy and Insolvency Act* (Statutes of Canada 1997, chapter 12) regarding the potential personal liability of receivers, receiver-managers and trustees in bankruptcy. These parties will be classed as responsible persons if they have operated the activity or business that has contributed to the contamination of the site or have caused or contributed to environmental problems at the site through gross negligence or wilful misconduct. The receiver, receiver-manager or trustee in bankruptcy will be liable for costs related to environmental matters that occur after their appointment if it is a result of their gross negligence or wilful misconduct.

If these parties did not operate the activity or business, are merely taking steps to liquidate assets on behalf of creditors, and do not add to environmental concerns in taking these steps, they will not bear personal liability for remediation costs. However, the Department may undertake remedial action and seek to recover remediation costs as a creditor of the party in receivership or

bankruptcy. In addition, the recent amendments to the federal *Bankruptcy and Insolvency Act* provide a first charge to the federal or provincial governments against the contaminated land for the recovery of remediation costs.

3.1.3 Fiduciary Representatives

Executors, administrators and trustees, other than trustees in bankruptcy, who control the property of a responsible person will be exempt from personal liability for contamination that was present prior to their taking control of the property. However, the estate (of the responsible person) that they control may still be available for payment of remediation costs. Section 226 of the Act sets out a limitation of liability for these parties, providing that their liability is limited to the net value of the assets that they are administering. The value of the assets under administration shall be interpreted to be the net value of the estate, namely, the value of the estate remaining for distribution to beneficiaries, after payment of applicable taxes, fees, and other costs payable in the normal course of administration of the estate.

The Department takes a position regarding these parties that is consistent with its treatment of receivers, receiver-managers and trustees in bankruptcy. Executors, administrators and fiduciary trustees will be classed as responsible persons if they have operated the activity or business that has contributed to the contamination of the site and have caused or contributed to environmental problems at the site through gross negligence or willful misconduct.

If these parties did not operate the activity or business, are merely taking steps to take control of the property on behalf of beneficiaries, and do not add to environmental concerns in taking these steps, they will not bear personal liability for remediation costs. However, if the Department takes remedial action, it may seek to recover remediation costs as a creditor of the estate.

MORE ABOUT LIABILITY OF REPRESENTATIVES

In discussing potential liability of representative parties for remediation of contaminated sites, a distinction must be made. Generally, parties who are acting in a representative capacity will not be held directly liable for claims arising out of actions properly taken by them. Any claims arising in these circumstances will be a liability of the estate (property) being controlled by these parties.

However, in situations where the representative's actions go beyond the standards legally imposed upon it, the representative may be held personally liable for claims arising out of such actions. In these circumstances, liability would be assessed directly against the representative rather than the estate under the representative's control.

3.1.4 Municipalities

Municipalities that take possession of tax recovery property or become owners of tax recovery property not sold at public auction will be exempt from liability for contamination existing prior to their taking possession of or title to the property. Section 96(1)(c)(vii) of the Act provides that a municipality will only be classed as a responsible person in these circumstances if it worsens existing contamination or causes further environmental problems at the site after taking possession of or title to the property.

Section 427(2) of the *Municipal Government Act* provides that funds recovered by the municipality when property is sold through the tax recovery process will be applied first to repay remedial costs related to the property, before payment of tax arrears. "Remedial costs" are defined in the *Municipal Government Act* as costs incurred by the Alberta government to perform work under an Environmental Protection Order or an Enforcement Order issued under EPEA.

3.1.5 Manufacturers and Suppliers of Substances

Manufacturers or suppliers of substances (contaminants) present on a contaminated site that is not controlled by them will be exempt from liability for contamination. They will not be classed as responsible persons unless they were responsible, by contract, agreement or otherwise, for the substance's release, disposal, handling, treatment or other uses that contributed to the contamination of the site. As well, manufacturers or suppliers of substances may be responsible persons if they failed to provide appropriate warnings about the proper use and handling of the substances. In those circumstances, the manufacturer or supplier may be considered to have caused or contributed to the contamination of the site.

3.1.6 Lenders

In most circumstances, lenders will fall within the scope of other categories discussed in section 3.1. However, there are certain situations outlined below where liability concerns arise which are specific to lenders.

3.1.6.1 Lenders as Owners

Lenders who take title to property will be exempt from liability for contamination that was present prior to their taking title. They will, as the property owner, be classed as responsible persons only if they fail to take reasonable steps to prevent further contamination, or otherwise fail to satisfactorily address ongoing environmental concerns at the site. Such liability as a responsible person will be limited to the value of the property.

3.1.6.2 Lenders – Actual Influence or Involvement

A lender who has a secured interest in the property of a responsible person may face liability if it has had charge, management or control of the business of the responsible person (debtor). A

lender will be seen to have or have had actual influence or involvement in the control or management of the debtor's business in the following circumstances:

- where the lender assumes responsibility for overall management of the debtor's business, dealing with day-to-day operational matters, including environmental compliance. Where the lender controls decision-making regarding all operational matters other than environmental compliance, it will be assumed that the lender has artificially "carved out" the area of environmental compliance in an attempt to avoid environmental liability. The burden will then rest with the lender to demonstrate that this situation is not an attempt by it to avoid such liability.
- where the lender's actions or requirements directly influence the debtor's business decisions regarding environmental compliance, including practices affecting the handling and disposal of substances that could cause contamination.

Certain actions taken by the lender to protect its security interest in the debtor's business will not create environmental liability on the lender's part, if these activities do not fall within the scope of charge, management or control of the debtor's business. Actions which may not result in liability for contaminated sites include, but are not limited to:

- participation by the lender only in purely financial matters related to the debtor's business.
- activities to "police" the loan to the debtor, as long as such activities cannot be considered as charge, management or control of the debtor's business. This may include activities such as imposing requirements on the debtor to comply with applicable environmental laws, standards, policies or codes of practice, or taking steps to obtain information on any contamination that may be on the site of the debtor's business.
- "work-out activities", by which the lender seeks to prevent or cure any default by the debtor or to preserve the value or prevent the diminishment of the security, as long as such activities cannot be considered as charge, management or control of the debtor's business. This may include activities such as restructuring or renegotiating the terms of the loan, requiring the provision of further security by the debtor, or providing financial advice to the debtor.

The above are merely illustrations of activities which may be carried out by lenders without becoming liable for contaminated sites in which their debtors are involved. The key to potential lender liability in these circumstances will be whether the lender had actual influence or involvement in the control or management of the debtor's business.

4. Designation of Contaminated Site

Once review of the circumstances of a particular site and of the responsible persons has taken place, the Director will be in a position to designate a contaminated site under the Act if no voluntary action acceptable to the Director has been taken by all responsible persons. Actual

designation of a site begins the statutory process set out in Part 4, Division 2 of the Act and gives rise to the liabilities and rights of persons responsible for the contaminated site.

4.1 Designation Document

The Director will designate a contaminated site by issuing a designation document. This document will describe all property included as the contaminated site. A designated contaminated site may contain more than a single piece of property held by more than one owner, for example, if neighbouring properties are also affected by the contaminant source (i.e., contamination extends over more than one piece of property). The designation document will also set out a brief history of the property ownership and any operations on the site, and will indicate the substance and its effects that have caused, are causing or may cause a significant adverse effect at the site.

4.2 Notice of Designation

Section 111 of the Act requires that notice of the designation of a contaminated site be given to parties listed in the Act. Notice of designation is important because it starts the time limits for filing Statements of Concern and for appealing the decision to designate a contaminated site.

4.2.1 Property Owners and Responsible Persons

Owners of property designated as a contaminated site and parties identified by the Director as persons responsible for the contaminated site will be given a copy of the designation document as notice of designation of the contaminated site. Property owners may not be named as responsible persons in every instance, but will always receive a copy of the designation document.

4.2.2 Municipal Authorities

Section 111(a)(ii) of the Act requires the Director to provide notice of the designation to the local authority of the municipality in which the contaminated site is located. Notice will be given to municipal authorities by providing a copy of the designation document to the council of the municipality.

4.2.3 Regional Health Authorities

The regional health authority for the municipality or area in which the contaminated site is located will receive notice of the designation. Notice will be given by providing the regional health authority with a copy of the designation document. This notice is provided to enable the regional health authority's involvement in the designation process, given its interest and involvement in public health and safety issues.

4.2.4 General Public

The Act also provides for notice to the general public of the Director's decision to designate a contaminated site. Once a site has been designated, public notice will be given by publication in a

newspaper with general circulation in the municipality or area where the contaminated site is located, or by other means determined appropriate by the Director, such as posting at the site or at a central location such as a local post office.

4.3 Statements of Concern

Section 112 of the Act provides that persons who are directly affected by the designation of a contaminated site may provide a Statement of Concern to the Director. A Statement of Concern need not follow a particular format; a letter to the Director setting out the person's concerns regarding the environmental condition of the contaminated site, its designation or any ongoing or proposed remedial measures is sufficient. However, the Statement of Concern should include the following information:

- the name, address and telephone number of the person providing the Statement of Concern, and
- a statement of the person's concerns about their status as a responsible person, or where the person is not a responsible person, a statement of how they consider themselves to be directly affected by the designation of the contaminated site. This will assist the Director in the review of Statements of Concern.

The Director will review all Statements of Concern received, and take them into consideration when the remediation plan is developed.

According to section 112(2) of the Act, Statements of Concern must be provided to the Director within 30 days of notice of designation of the contaminated site. The designation document and public notices of the Director's decision to designate will all contain statements alerting parties who may be directly affected that they may have the right to provide a Statement of Concern. In some circumstances, the Director may choose to extend the time for providing Statements of Concern. Where this is the case, the extended time period will be noted in the designation document or accompanying covering letter and in public notices of the decision to designate.

4.4 Appeals of Designation

Section 84(1)(j) of the Act provides an opportunity for persons directly affected by the designation of a contaminated site to appeal to the Environmental Appeal Board. Appendix II sets out a brief description of the Environmental Appeal Board and its appeal process.

The process of appealing a matter to the Environmental Appeal Board is commenced by filing a Notice of Objection with the Board. All notices of designation of a contaminated site will include information alerting persons, who may be directly affected by the designation, of their rights of appeal, and providing them with the address and telephone number of the Board. Information respecting the format and contents of the Notice of Objection can be obtained from the Environmental Appeal Board.

MORE ABOUT CONTAMINATED SITES APPEALS

The Environmental Appeal Board is an independent body that hears appeals of matters related to the Act, including contaminated sites matters.

Contaminated sites matters that can be appealed to the Board include the designation of a contaminated site, and the issuance of an Environmental Protection Order under section 114 of the Act. Designation of a contaminated site can be appealed by any person directly affected by the designation. A section 114 Environmental Protection Order can be appealed by any responsible person to whom the order is directed or any person directly affected by the designation of the contaminated site. For either appeal, the party seeking to appeal must file a Notice of Objection with the Board within 30 days of receiving notice of the designation or the Environmental Protection Order in order to begin the appeal process.

The Environmental Appeal Board will dismiss appeals where it determines that the person appealing is not "directly affected". The Board has stated that the definition of "directly affected" is flexible and will depend on the circumstances of each case. However, the Board will generally look for a link between the matter in question, its environmental effects and the person seeking status as a directly affected person.

On appeals of the designation of a contaminated site or the issuance of a section 114 Environmental Protection Order, the Board has the jurisdiction to hear the appeal and make recommendations on its disposition to the Minister of Environment. The Minister has final decision-making authority concerning the appeal, and may confirm, reverse or vary the designation of the contaminated site or issuance of the Environmental Protection Order. The Minister may also make any orders that he considers necessary to carry out the decision on appeal.

Appeals before the Board may also be resolved before or at a hearing. If an appeal is resolved, the Board prepares a report that is consented to by all parties and forwarded to the Minister for review and a final decision.

Time lines related to the contaminated sites process will be held in abeyance during any appeal of a contaminated sites matter to the Board.

5. Cost Allocation and Remediation

5.1 Factors for Consideration

Throughout the remediation and cost allocation process, various factors will be considered in relation to both agreements and Environmental Protection Orders. These factors involve both the allocation of remediation costs and the remediation of the contamination.

5.1.1 Allocation Factors

Responsible persons should keep the following factors related to allocation of remediation costs in mind throughout the cost allocation and remediation process. The Director will also take these factors into account in formulating an Environmental Protection Order under section 114 of the Act.

- Whether the land in question was acquired by the responsible person solely to protect secured interests (eg. lenders) or acquired involuntarily (eg. municipalities, fiduciary trustees).
- Whether the contamination resulted from an activity that was carried out contrary to legislation.
- Whether the responsible person caused the contamination or had a role in causing the contamination.
- Whether the responsible person will benefit from the remediation of the contamination. In some circumstances, this benefit may be difficult to determine until the remediated property is sold.
- Whether the responsible person benefited from failing to control the contamination.
- When the contamination occurred in relation to the responsible person's involvement with the site.*
- The responsible person's knowledge of the existence of the contamination.*
- The responsible person's diligence in attempting to discover the contamination.*
- The responsible person's diligence in attempting to mitigate the contamination.*
- Actions undertaken by the responsible person to prevent the contamination.*
- Whether the contamination was caused by the actions or omissions of third parties not connected to the responsible person.*

* See Section 114(2) Environmental Protection and Enhancement Act

- The price paid by the responsible person for the site in relation to its likely market value if uncontaminated.*
- Where the responsible person is a previous owner of the site, whether that owner disposed of the site without disclosing information about the contamination to the purchaser.*
- Whether accepted industry standards were being followed at the time that the contamination occurred.*
- Whether the responsible person contributed to further contamination.*
- Any other criteria considered by the Director to be relevant. This will vary depending on the circumstances of the particular case.

5.1.2 Remediation Factors

In discussing site remediation and developing a remediation plan, the responsible persons should keep in mind the following factors.

- Relevant guidelines for the remediation of contaminated sites.
- The remediation work to be carried out and the procedures or processes to be used.
- The dates for completion of each major stage of the remediation.
- Which party or parties will be responsible for ensuring completion of each major stage of the remediation.
- Any other matters that may be required by the Director, dependent on the circumstances of the case.

The Director will also consider these factors in developing an Environmental Protection Order under section 114 of the Act.

5.2 Negotiations Between Responsible Persons

After a site has been designated and notice has been given to all responsible persons, these persons will be given up to three months from the date of designation to carry out discussions and attempt to reach a voluntary agreement concerning site remediation and cost allocation. The Department's role at this stage will involve providing available information about the contaminated site to the responsible persons, and monitoring the progress of negotiations. The Director may request the responsible persons to provide interim reports to keep the Department

* See Section 114(2) Environmental Protection and Enhancement Act

current on the status of negotiations. However, the Department may be actively involved in negotiations if the provincial government is a responsible person for the contaminated site.

In some circumstances, the Director may be a party to the agreement, for example, if the Department has a program in place under section 109 of the Act to pay certain costs, or where the provincial government is a responsible person. Where the Director is not a party to the agreement, the responsible persons must submit it to the Director for approval. Such an agreement will not be valid without this approval.

The responsible persons may use mediation to aid in reaching an agreement. Mediation may be entered into upon the parties' initiative, or the parties may request the Department's assistance in arranging mediation. The costs of mediation will be shared by all responsible persons participating in the mediation.

5.2.1 Timelines For Negotiations

The basic time period for negotiations will be up to three months, but this may vary depending on the circumstances of the particular site and the responsible persons. All responsible persons will be made aware of the time limits and any reporting requirements in a covering letter which they will receive with the designation document. The letter will also inform them that they may propose a voluntary cost allocation and remediation plan to the Director, either individually or jointly.

The Director will have discretion to extend the negotiation time limits where requested by the responsible persons. If it can reasonably be shown that there is a good opportunity for agreement with a time extension, the Director may extend the time period. Generally, there will be only one time extension allowed, and the Director may refuse a request for an extension when of the opinion that there has not been satisfactory progress made towards agreement or that the request is being made to delay the designation process.

5.2.2 Voluntary Cost Allocation and Remediation Agreement

Where all the responsible persons have reached an agreement through negotiation or mediation, section 113(2) of the Act requires them to submit it to the Director for approval. Such an agreement must deal with both remediation and cost allocation.

Section 113(3) provides that no Environmental Protection Orders will be issued under section 114 of the Act to parties to an approved agreement as long as the agreement is carried out according to its terms. However, if any party does not comply with the agreement, the Director may then issue an Environmental Protection Order under section 114 of the Act directing that remediation and cost allocation be carried out.

5.2.3 Review and Approval of Agreement

In reviewing a proposed agreement, the Director will consider all the factors mentioned in sections 5.1.1 and 5.1.2 concerning allocation of costs and remediation. As well, the Director will require the responsible persons to submit the following information in a report form for his review and consideration:

- The nature and quantity of contamination on the site or released from the site that is attributable to (a) the responsible person, and (b) other responsible persons at the site.
- A detailed description of each responsible person's historic and current activities on the site, including the amount and characteristics of contamination at the site attributable to each responsible person's activities.
- An estimate of the total cost of investigation and remediation, including supporting documentation.
- An estimate of each responsible person's share of the total cost of remediation and justification for the estimate.
- A statement describing each responsible person's ability and plans to conduct and finance the remediation.
- A certification by each responsible person that the person has fully and accurately disclosed all information in their possession regarding conditions at the contaminated site and the responsible person's activities at the contaminated site.

Upon review of the proposed agreement and consideration of all information and relevant factors, the Director will either approve or reject the proposed agreement. If the agreement is approved, the responsible persons may then take steps to carry out the agreement under the Department's supervision.

If the Director approves of the bulk of the agreement and has concerns with only minor elements, the parties will be given an opportunity to modify the proposed agreement. The Director will advise the parties of the areas that require revision and will specify a time limit within which they may revise and resubmit the proposed agreement for the Director's approval. If the agreement is not approved after these revisions, the designation process will continue on to the next step of directed allocation.

The Director will review a proposed agreement and either approve or reject it within 30 days of it being submitted to the Director. All responsible persons will be notified of the Director's decision to either approve or reject the proposed agreement. If an agreement is approved, the Director will ensure that it includes appropriate timelines for the performance and completion of remediation of the contaminated site.

5.3 Directed Cost Allocation and Remediation Plan

Where negotiations fail to produce a cost allocation and remediation agreement, the matter will proceed to the next step of the process, directed allocation. This step will involve review of all relevant material and information by the Director, who will issue an Environmental Protection Order under section 114 of the Act to direct remediation and allocate liability for costs among all responsible persons. The order will direct the responsible persons to remediate the site and will establish reporting requirements, but will not direct that a specific method of remediation be used. The method of remediation is a matter to be determined by the responsible persons. An external advisory committee may become involved at this stage by reviewing allocation matters and making recommendations to the Director about liability for costs.

5.3.1 Allocation by Director

All material gathered over the course of the designation process will be reviewed by the Director, who will consider all factors mentioned in sections 5.1.1 and 5.1.2 dealing with allocation and remediation. The Director will request any further information from responsible persons necessary to assist in making a fair allocation of costs and remediation responsibility. This may include requiring responsible persons to provide the information required under section 5.2.3 where it has not yet been given to the Department.

5.3.2 External Advisory Committee

Section 4 of the Act allows the Minister of Environment to establish advisory committees to provide assistance and report to the Minister concerning matters related to the Act. A Contaminated Sites Advisory Committee ("the Committee") would assist the Director in the designation process. The Director would select a panel of three committee members from the committee at large to review information and make recommendations on the allocation of liability for remediation costs.

At the directed allocation stage, the Director may seek the committee's assistance regarding the allocation of remediation costs. The panel will review all information provided by responsible persons and the Department, consider the factors related to allocation, and make recommendations to the Director concerning the allocation of remediation costs. The review and provision of recommendations must be completed within two weeks of the Director's appointment of the three person panel; however, the Director has the discretion to extend this time period where necessary.

The Director will consider the Committee's recommendations in determining the allocation of remediation costs but is not bound by them. The Director's decision on responsibility will be released in the form of an Environmental Protection Order under section 114 of the Act. The recommendations and reports will be provided to the Minister of Environment in all cases.

5.3.3 Timelines

The Director will take such time as is necessary to ensure that the matters of cost allocation and remediation plans are completely reviewed and that all relevant factors are considered. All responsible persons will be notified of the Director's allocation of liability and plans for remediation as set out in the Environmental Protection Order. When the Environmental Protection Order is issued, the Director will ensure that it includes appropriate timelines for the performance and completion of remediation of the contaminated site.

5.4 Joint and Several Liability

The use of joint and several liability in relation to the remediation of contaminated sites is a difficult matter, particularly given the emphasis on fairness to all parties involved. The application of joint and several liability to contaminated site remediation would have the effect of making all responsible persons equally liable for the entire cost of remediation. This is normally seen as unfair, as default in payment by one or more responsible persons would result in the remaining responsible persons bearing greater shares than they would otherwise be allocated.

The use of joint and several liability in the designation process will be limited to very specific instances. Joint and several liability will be applied by the Director in Environmental Protection Orders in the following circumstances:

- To pay for orphan shares of liability under agreements where there is not a fund available to pay these shares. Attributing liability for an orphan share equally on a joint and several basis among the other responsible persons provides a greater measure of fairness than requiring one party with "deep pockets" to pay for the entire orphan share together with its own liability.
- To deal with situations where a number of related "shell" or holding companies are involved with a contaminated site, and there is uncertainty or limited information available on their actual relationships. The use of joint and several liability to divide costs equally among these parties in this type of situation will act as an incentive for responsible persons to provide complete information to the Director, and will prevent the use of corporate structures as a shield from liability.
- To deal with situations where no information is available or there is a lack of information upon which the Director may base a fair allocation of liability. For the allocation of liability to succeed, it is crucial that the Director have sufficient information and grounds upon which to base any allocation that he may make, otherwise such an allocation may be subject to challenge. The use of joint and several liability in this situation will also provide an incentive for responsible persons to provide complete information to the Director to assist in the allocation of costs.

6. Environmental Protection Orders (s.114 EPEA)

As indicated above, the Director will issue Environmental Protection Orders to responsible persons under section 114 of the Act where there has not been an agreement with respect to cost allocation and remediation.

6.1 Contents and Format

The Environmental Protection Order will set out the allocation of liability for remediation costs between responsible persons and remediation requirements for the site, and may specify restrictions on the use of the site or any products derived from the site.

The Environmental Protection Order will also contain sections alerting responsible persons to whom the order is directed and persons who may be directly affected by the designation of the contaminated site about rights they may have under the Act to appeal the Environmental Protection Order.

6.1.1 Allocation

Within the Environmental Protection Order, all responsible persons will be listed. The allocation will indicate those potentially responsible persons who were initially exempted from the designation process, as well as those responsible persons who are exempted from liability or otherwise allocated a zero share of liability. In the Environmental Protection Order, the Director will also indicate the allocation of liability for remediation costs with respect to all remaining responsible persons. This allocation will be reflected in percentages of the total remediation and associated costs.

The Director will set out reasons for the allocation, and will indicate the information and factors relied upon in reaching the allocation. As well, the Director will indicate any deficiencies in the information provided with respect to allocation.

6.1.2 Remediation

The Director will set out required steps to be taken by the responsible persons in remediating the site, together with relevant timelines. Section 114 of the Act allows the Director to require in an Environmental Protection Order that measures be taken to restore or secure the contaminated site and the environment affected by it. However, the Director will not dictate how the responsible persons are to achieve remediation of the site. Requirements to report to the Department over the course of remediation will also be included in the Environmental Protection Order.

The Environmental Protection Order will set out requirements for keeping the public informed regarding the progress of remediation.

In the Environmental Protection Order, the Director may also regulate or prohibit the use of the contaminated site or any product that comes from the contaminated site. Should regulations be

developed to deal with the restriction of use of contaminated sites and products from contaminated sites, the Environmental Protection Order will be in accordance with such regulations where it seeks to restrict land or product use.

6.2 Notice of Order

Section 115 of the Act requires that notice of the Environmental Protection Order be given to a number of parties once it has been issued by the Director. Notice is important because it starts the time limit for appealing the Environmental Protection Order. Notice of the Environmental Protection Order will be given to property owners, responsible persons, municipal authorities and regional health authorities as set out in sections 4.2.1, 4.2.2, and 4.2.3.

Aside from the parties mentioned above, the Act also provides for notice to the general public of the issuance of an Environmental Protection Order under section 114. This notice will be given in the same manner as set out in section 4.2.4.

6.3 Appeals of Order

Section 84(1)(g) of the Act provides for the appeal to the Environmental Appeal Board of the issuance of Environmental Protection Orders dealing with contaminated sites under section 114. Every Environmental Protection Order issued under section 114 will include information alerting responsible persons of their rights of appeal, and providing them with the address and telephone number of the Board. All notices of issuance of an Environmental Protection Order under section 114 will include information alerting persons who may be directly affected by the designation of the contaminated site of their rights of appeal, and providing them with the address and telephone number of the Board.

7. Non-Compliance or Failure to Remediate

Once a cost allocation and remediation agreement is in place, or an Environmental Protection Order has been issued, the Department will monitor the progress of remediation at the contaminated site.

7.1 Remedial Action

Where there is non-compliance with a voluntary agreement, the Director will issue an Environmental Protection Order under section 114 to the responsible persons who are not in compliance. Such an order will direct these persons to take steps as specified to comply with the agreement and ensure that remediation is carried out and that the agreed allocation of costs applies. Should these responsible persons fail to comply with the Environmental Protection Order, the Department will assess the various enforcement options available under the Act to deal with the non-compliance and choose the appropriate tool for the situation.

7.2 Enforcement Action

The Act provides the Department with various enforcement tools which may be used in situations where persons are contravening the Act. It is a contravention of section 213 of the Act to fail to comply with an Environmental Protection Order, and in these instances the Department may choose an enforcement tool or tools appropriate to the particular circumstances, consistent with the Act's Enforcement Program.

7.2.1 Enforcement Orders

Where a responsible person is not in compliance with an Environmental Protection Order, the Director may choose to issue an Enforcement Order to that person. Enforcement Orders are used to require parties to come into compliance with the Act where they are in contravention of it, and can direct remediation action with respect to contaminated sites, the stoppage of operations (which are either related to remediation or causing further contamination on site), or any other steps which may be necessary to ensure compliance with the Act. In addition to setting out the steps required to come into compliance with the Act, these orders will set out timelines and reporting requirements.

7.2.2 Prosecution Under EPEA

Where a responsible person does not comply with an Environmental Protection Order, the Department may choose to prosecute that person under section 213 of the Act for contravening an Environmental Protection Order. Upon conviction, this offence carries a maximum penalty of a \$50,000 fine for an individual or a \$500,000 fine for a corporation.

In situations where the Department has clear evidence that the responsible person knowingly contravened the Environmental Protection Order (i.e., where it can be shown that the responsible person intended not to comply with the order), it may choose to prosecute that person for the more serious offence of knowingly contravening an Environmental Protection Order. Upon conviction, this offence carries a maximum penalty of a \$100,000 fine or up to 2 years imprisonment or both for an individual, or a maximum fine of \$1,000,000 for a corporation.

The Act also provides that any offence is considered a separate offence for each day that it continues. For example, if a responsible person was not in compliance with an Environmental Protection Order for one week, that person could potentially be charged with seven separate offences of contravening an Environmental Protection Order. The significance of this is clear in relation to penalties upon conviction, as the responsible person could be assessed the maximum penalty for each of the seven separate offences (i.e., a total maximum fine of \$350,000 for an individual for the seven offences).

7.2.3 Government Remediation and Cost Recovery

Section 231 of the Act provides the Department with another option to deal with non-compliance with Environmental Protection Orders. Where a responsible person fails to carry out the order,

the Director may take whatever action he considers necessary to carry out the terms of the order. Where the Director takes such action, the government may sue the responsible person for the costs of this action. Section 231 indicates that recoverable costs will include costs incurred in administering, investigating and responding to matters related to the Environmental Protection Order and the failure to comply with the order. As well, where compensation is paid by the Minister under section 116 of the Act with respect to a designated contaminated site, the amount of compensation may be added to the recoverable costs.

8. Completion of Remediation

Upon completion of remediation as provided for by agreement or Environmental Protection Order, verification of completion will be required from the responsible persons. Following verification, the Department will provide a letter of compliance or Remediation Certificate indicating completion of remediation in accordance with the applicable agreement or order. The Department will, at the same time, deal with any concerns regarding site restrictions or any risk management requirements.

8.1 Verification of Remediation

Approved agreements and Environmental Protection Orders will contain requirements with respect to verification of remediation. This may include sampling and analysis to confirm that remediation has met applicable standards and that it has dealt with the total extent of contamination, including off-site contamination where it has occurred. Responsible persons must provide all required verification information to the Department for review. The verification shall be in the form of a written closure report submitted to the Director documenting remediation activities undertaken at the site, environmental conditions achieved, and any requirements for continued site management, including monitoring and restrictions on site use.

Upon receipt of the required verification information, Alberta Environment will review the material to determine whether remediation has been satisfactorily completed. Where necessary, Alberta Environment may require the submission of further information or additional sampling and analysis for confirmation.

Where Alberta Environment determines that remediation has been satisfactorily completed, a letter of compliance or Remediation Certificate will be issued. These documents will be discussed in greater detail in sections 8.3 and 8.4. In making this determination, the Department will consider whether the site has been remediated in compliance with the applicable agreement or Environmental Protection Order.

8.2 Registration of Land or Product Use Restriction

Part 4, Division 2 of the Act allows the Department to restrict the use of the land or products from the land where a contaminated site is designated. This may be done within an agreement or an Environmental Protection Order, by restrictive land use agreement, or by regulation.

If land or product use has not been restricted over the course of site remediation, Alberta Environment will examine whether there is any need to impose restrictions prior to issuing the letter of compliance or Remediation Certificate. Where restrictions have been imposed during remediation, these will be reviewed to determine whether they are still applicable after remediation is completed.

Section 22 of the Act provides for voluntary agreements between the Minister and landowners to restrict the purposes for which land may be used by the registered owner and subsequent owners. These agreements are registered against the title to the property. These agreements will be used to set out land use or product use restrictions applicable to remediated contaminated sites after completion of remediation, and to provide a record of these restrictions on the title of the property.

Section 210.1 (1) (a) allows for the designation document to be registered on the title of any land that has been designated by the Department. Only when the remediation has been completed to the satisfaction of the Director, will this be removed from the land title.

8.3 Letter of Compliance

Where Alberta Environment has determined that remediation of a contaminated site is satisfactory, a letter of compliance may be issued to the owner of the site and the responsible persons. This letter will indicate that the site has been remediated in accordance with the applicable agreement or Environmental Protection Order. Information about the extent and levels of remediation, as well as the existence of any restrictions regarding the site, will be included in the letter.

The letter will expressly indicate that it is not a warranty by the Department of the condition of the contaminated site. It will be based on the site conditions at the date of issuance and the information available to the Department at that time. The letter will also expressly indicate that the responsible persons may be liable for future remediation, should further contamination subsequently be discovered.

Copies will be provided directly to the council of the municipality in which the contaminated site is located and the regional health authority of the municipality or area in which the site is located.

8.4 Remediation Certificate

Section 105.1 of the Act provides for the issuance of Remediation Certificates by the Director after remediation of land upon which a substance release has occurred. The registered owner of the land in question or the person responsible for the substance must apply to the Director for a Remediation Certificate.

The Director may issue a Remediation Certificate subject to any terms or conditions that he considers appropriate. Issuance of a Remediation Certificate prevents the issuance of any Environmental Protection Order requiring further work in relation to the same release of the same

substance after a date prescribed in the regulations. However, the issuance of a Remediation Certificate does not relieve a person of the obligation to obtain a reclamation certificate in respect of specified land, as defined in the *Conservation and Reclamation Regulation*, that has been remediated.

8.5 Reclamation Certificate

Where a contaminated site includes land that was used for an activity described in the *Conservation and Reclamation Regulation* (see "specified land" in that Regulation), a Reclamation Certificate may be issued when all requirements have been met in accordance with section 123 of the Act. The specific activities set out in the *Conservation and Reclamation Regulation* cover a number of activities that cause surface disturbance to land, including many industrial activities.

An operator on specified land must reclaim and apply to an appropriate Regional Director of Environmental Services of Alberta Environment for a Reclamation Certificate after the land surface has been reclaimed in accordance with the Act, the *Conservation and Reclamation Regulation*, any applicable guidelines, and any approvals or Environmental Protection Orders issued with respect to the specified land.

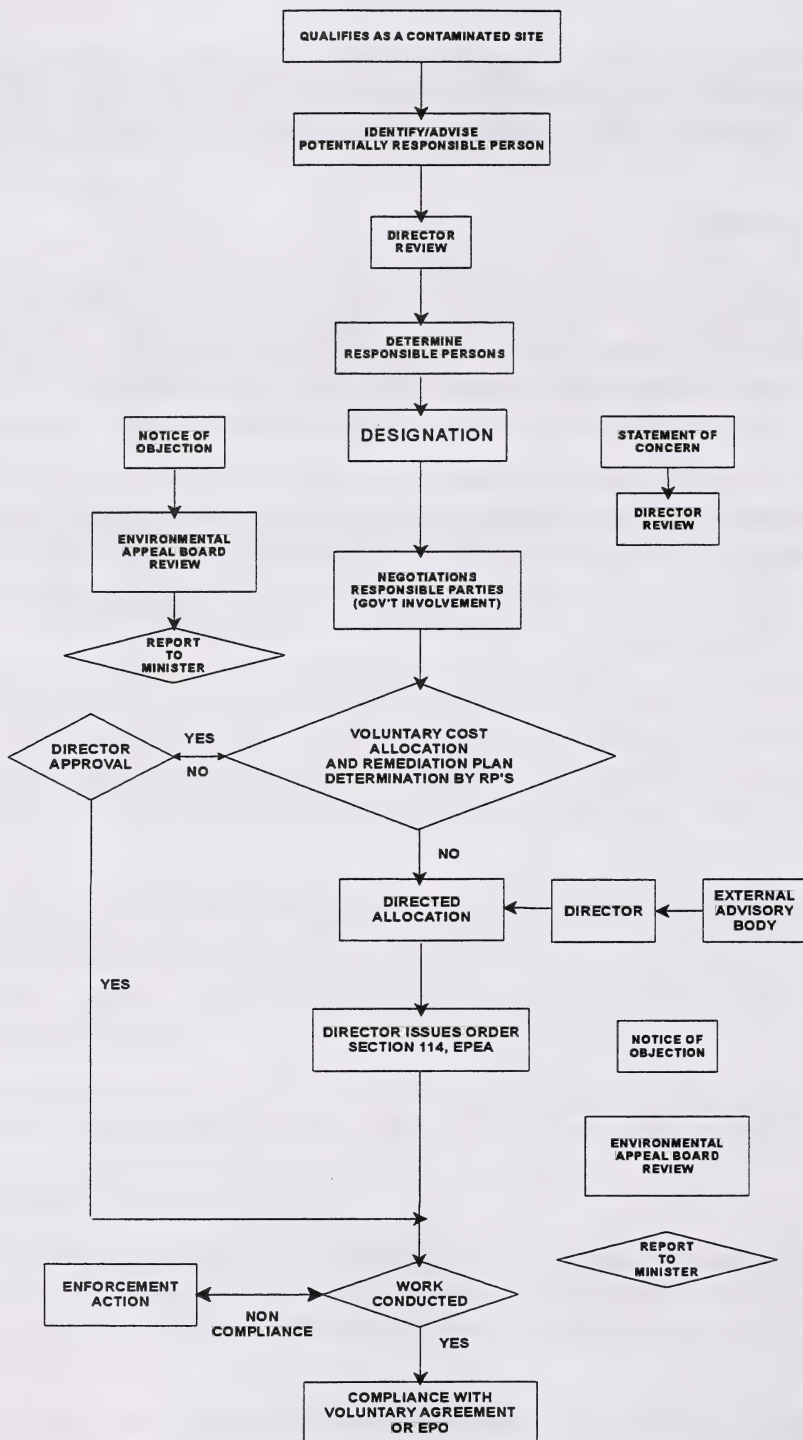


Figure 1. Contaminated Sites Designation Process

GLOSSARY

"the Act" - the *Environmental Protection and Enhancement Act*.

"allocation of costs" - attributing portions of the total costs of remediating a contaminated site among responsible persons.

"contaminated site" - an area of the environment designated by the Director as a contaminated site under Part 4, Division 2 of the *Environmental Protection and Enhancement Act*, where the Director is of the opinion that a substance is present in that area which is causing, has caused or may cause a significant adverse effect.

"the Department" - Alberta Environment.

"designation process" - the entire process of dealing with contaminated sites under Part 4, Division 2 of the *Environmental Protection and Enhancement Act*.

"Director" - an official of Alberta Environment given certain powers and responsibilities under the *Environmental Protection and Enhancement Act*; in relation to Part 4, Division 2 of the Act; each of the six regions in the Environmental Service of Alberta Environment has a Regional Director.

"Enforcement Order" - an order which may be issued by the Director under the *Environmental Protection and Enhancement Act* when a person is contravening the Act; an Enforcement Order is used to require a person to come into compliance with the Act.

"Environmental Protection Order" - an order which may be issued by the Director under the *Environmental Protection and Enhancement Act* to deal with actual or anticipated environmental harm or damage; an Environmental Protection Order may be issued regardless of whether a person is in compliance with the Act.

"EPEA" - the *Environmental Protection and Enhancement Act*.

"orphan share" - there are two types of orphan shares related to contaminated sites. The first arises where all shares of liability are to be allocated, and there is not an identifiable person to whom a share can be allocated. The second arises where a responsible person can only pay a portion of the total amount of his allocated liability and has no further assets available to be applied against his remaining liability.

"orphan site" - a contaminated site at which 100 percent of the liability is allocated to orphan shares. See also "orphan share".

"potentially responsible person" - a person who may fall within one of the classes of persons responsible for remediation of a contaminated site and payment of associated costs; see "responsible person".

"person" - includes both individuals and corporations; equally applicable to "potentially responsible person" and "responsible person".

"remediation and allocation agreement" - an agreement between responsible persons dealing with remediation of a contaminated site and allocation of the costs of remediation.

"remediation" - the treatment of a contaminated environmental medium to prevent, minimize or mitigate any adverse effects to the environment, human health or safety or property now or in the future. Remediation involves the development and application of a planned approach that removes, destroys, contains or otherwise reduces the availability of contaminants to any receptor.

"responsible person" - a person who falls within the definition of "person responsible for the contaminated site" set out in section 96(1)(c) of the Act; such a person is responsible for remediation of a contaminated site and payment of associated costs.

"risk assessment" - a qualitative and quantitative characterization of the nature and magnitude of risks of adverse effects on human health or ecosystems from exposure to one or more chemicals. Risk assessments estimate contaminant intake by organisms and compare with "no effect" or "acceptable risk" intakes.

"risk management" - the removal or control of one or more risk components. See also "risk assessment".

"significant adverse effect" - the key factor set out in the Act for determining whether an area of the environment should be designated as a contaminated site. Adverse effect can become significant when there is an actual or high probability of impact which has or could have a severe consequence on human health, safety or the environment.

"trustee" - a person who has legal authority to control the property of another. In insolvency situations, the federal *Bankruptcy and Insolvency Act* defines "trustee" to include receivers, receiver-managers and trustees in bankruptcy. These parties generally seek to recover and liquidate as much of an insolvent debtor's assets as possible for payment to the debtor's creditors. In non-insolvency situations, "trustee" may include: (i) an executor or an administrator of the estate of a deceased person; (ii) an express trustee or a bare trustee, (iii) a committee or other person appointed by a court as a representative under any adult guardianship legislation; (iv) a guardian of the estate of an infant, and (v) an attorney acting under an enduring power of attorney whose principal lacks the capacity to manage his or her own affairs. In these situations, the trustee controls the property of another for the benefit of that person or other persons. This Guideline also refers to these non-insolvency trustees as "fiduciary representatives" or "fiduciary trustees".

APPENDIX I

Provisions of the *Environmental Protection and Enhancement Act* Dealing with Contaminated Sites

1 In this Act,

(ss) "person responsible", when used with reference to a substance or a thing containing a substance, means

- (i) the owner and a previous owner of the substance or thing,
- (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
- (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
- (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),

but does not include

- (v) a municipality in respect of a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the *Municipal Government Act* or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing, or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or
- (vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel.

96(1) In this Part,

- (c) "person responsible for the contaminated site" means

- (i) a person responsible for the substance that is in, on or under the contaminated site,
- (ii) any other person who the Director considers caused or contributed to the release of the substance into the environment,
- (iii) the owner of the contaminated site,
- (iv) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site,
- (v) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (ii) to (iv), and
- (vi) a person who acts as the principal or agent of a person referred to in any of subclauses (ii) to (v),

but does not include

- (vii) a municipality in respect of a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the *Municipal Government Act* or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing, or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or
- (viii) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel.

105.1

(1) The Director may issue a remediation certificate in respect of land where

- (a) a release of a substance into the environment has occurred,
- (b) the release has caused, is caused or has the potential to cause an adverse effect, and
- (c) remediation of the land has been carried out in accordance with

- (i) the terms and conditions of any applicable approval,
 - (ii) the terms and conditions of an environmental protection order made in respect of the release,
 - (iii) the directions of an inspector or the Director, and
 - (iv) this Act.
- (2) An application for a remediation certificate may be made by the registered owner of the land or the person responsible for the substance.
- (3) An application for a remediation certificate must be made to the Director in a form and manner acceptable to the Director.
- (4) The Director may issue or refuse to issue a remediation certificate, and may issue the remediation certificate subject to any terms and conditions the Director considers appropriate.
- (5) The Director may:
 - (a) amend a term or condition of, add a term or condition to or delete a term or condition from a remediation certificate if the Director considers it appropriate to do so;
 - (b) cancel a remediation certificate issued in error; or
 - (c) correct a clerical error in a remediation certificate.

105.2

Where a remediation certificate is issued, no environmental protection order requiring the doing of further work in respect of the same release of the same substance may be issued under this Act after the date prescribed or determined for the purposes of this section in accordance with the regulations.

105.3

The issuing of a remediation certificate does not affect any person's obligation to obtain a reclamation certificate under this Act.

108

This Division applies regardless of when a substance became present in, on or under the contaminated site.

109

The Minister may establish programs and other measures the Minister considers necessary to pay for the costs of restoring and securing contaminated sites and the environment affected by contaminated sites in circumstances where a person responsible for the contaminated site cannot be identified or is unable to pay for the costs.

110

- (1) Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.
- (2) Subsection (1) applies notwithstanding that any or all of the following may apply:
 - (a) a reclamation certificate or remediation certificate has been issued in respect of the contaminated site;
 - (b) an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;
 - (c) the substance was released in accordance with this Act or any other law;
 - (d) the release of the substance was not prohibited under this Act; and
 - (e) the substance originated from a source other than the contaminated site.
- (3) The Director may cancel a designation of a contaminated site.

111

The Director shall:

- (a) give notice of his decision to designate an area of the environment as a contaminated site to;
 - (i) the owner of the contaminated site,
 - (ii) any of the other persons responsible for the contaminated site that the Director considers appropriate, and
 - (iii) the local authority of the municipality in which the contaminated site is located,and
- (b) provide notice of his decision to designate an area of the environment as a contaminated site in accordance with the regulations.

112

- (1) Any person who is directly affected by a designation of a contaminated site may submit a Statement of Concern to the Director setting out that person's concerns regarding the designation of the contaminated site and that person's recommendations on any remedial measures that should be taken with respect to the contaminated site.
- (2) A Statement of Concern must be submitted:
 - (a) within 30 days after receipt of the notice under section 111(a) or the last provision of the notice under section 111(b); or
 - (c) within any longer period allowed by the Director in the notice.

113

- (1) A person responsible for the contaminated site may:
 - (a) prepare for the approval of the Director a remedial action plan in respect of the contaminated site; and
 - (b) enter into an agreement with the Director, with other persons responsible for the contaminated site or with both the Director and other persons responsible, providing for the remedial action to be taken in respect of the contaminated site and providing for the apportionment of the costs of taking that action.
- (2) An agreement under subsection (1)(b) to which the Director is not a party is not valid unless it is approved by the Director.
- (3) Where an agreement made under subsection (1)(b) is carried out in accordance with its terms, the Director may not issue an environmental protection order under section 114 to any of the persons responsible for the contaminated site who are parties to the agreement in respect of any matter that is provided for in the agreement.

114

- (1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.
- (2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following where the information is available:
 - (a) when the substance became present in, on or under the site;
 - (b) in the case of an owner or previous owner of the site;

- (i) whether the substance was present in, on or under the site at the time that person became an owner,
 - (ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time that person became an owner,
 - (iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before he became an owner, and whether the owner exercised such due diligence,
 - (iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship, and
 - (v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it,
- (c) in the case of a previous owner, whether that owner disposed of his interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;
 - (d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;
 - (e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;
 - (f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;
 - (g) what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site;
 - (h) any other criteria the Director considers to be relevant.
- (3) In issuing an environmental protection order under subsection (1) the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 109.

- (4) An environmental protection order made under subsection (1) may:
- (a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 102;
 - (b) contain provisions providing for the apportionment of the cost of doing any work or carrying out any of the measures referred to in clause (a); and
 - (c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.

115

In addition to serving an environmental protection order issued under section 114 on the person to whom it is directed, the Director shall:

- (a) give notice of the issuance of the order to the local authority of the municipality in which the contaminated site is located; and
- (b) provide notice of the issuance of the order in accordance with the regulations.

116

The Minister may:

- (a) in accordance with any applicable regulations; or
- (b) in the absence of any applicable regulations, in the manner and amount the Minister considers appropriate

pay compensation to any person who suffers loss or damage as a direct result of the application of this Division.

117

The Minister may make regulations regulating and prohibiting the use of a contaminated site or the use of any product that comes from a contaminated site.

118

The Lieutenant Governor in Council may make regulations:

- (a) authorizing the payment of compensation by the Government for the purposes of section 116, including regulations respecting;
 - (i) the circumstances under which compensation will be paid, and

- (ii) the manner in which a claim for compensation is assessed and made and the determination of the amount payable;
- (b) respecting the manner in which notice is to be provided under sections 111(b) and 115(b).

APPENDIX II

ALBERTA ENVIRONMENTAL APPEAL BOARD

The Environmental Appeal Board was established in September 1993 under the *Environmental Protection and Enhancement Act*. The Board was established to hear appeals from applicants and affected parties on decisions regarding environmental approvals, enforcement actions, reclamation certificates, certificates of qualification, contaminated sites, and other matters.

Board Composition

Members of the Appeal Board are appointed by Cabinet. Appeals will be heard by a panel of Board members.

Appeal Time Limits

Generally, an appeal must be filed within 30 days of receiving notice of the decision. An appeal is begun by filing a *Notice of Objection* with the Board. An extension may be granted by the Board if it finds sufficient grounds to do so.

Dismissal of Appeals

The Environmental Appeal Board may dismiss an appeal if:

- it is determined that the appellant does not have standing or the Board does not have jurisdiction;
- the appeal is considered to be frivolous or vexatious;
- the appellant does not submit additional information requested by the Board; or
- the appellant fails to provide the required security for costs.

To prevent duplication of hearings, the Board must dismiss an appeal if:

- the appellant received notice of or participated in or had the opportunity to participate in one or more public hearings or reviews on the matter held by the Natural Resources Conservation Board or the Energy and Utilities Board, and all of the issues included in the appeal were adequately dealt with at that time; or
- the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all matters included in the appeal.

Status of Matters Under Appeal

In most cases, while an approval or order is being appealed, it is not stayed or put on hold unless agreed to by the Board. The party seeking the stay has the onus to request it and may be required to post security for costs.

Appeal Costs

A party to an appeal may apply to the Board for payment of costs of the appeal. This is a discretionary decision of the Board. The Board may order any party to the appeal to pay the costs. These costs are limited to the preparation and presentation costs of the party and may be requested on an interim or final basis.

Board's Report

After a hearing, the Board must submit a report and recommendations to the Minister of Environment within 30 days. The final decision is made by the Minister.

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